

Pagosa Daily Post

Dry Gulch Gets Wetter? Part One

Glenn Walsh | 9/22/08

Judge Gregory Lyman has filed his decision in *PAWSD v. Trout Unlimited* — the Dry Gulch water rights dispute — with the Supreme Court. Lyman’s decision is, essentially, a very confident restatement of the basis for his 2006 decision, which awarded the Pagosa Area Water and Sanitation District and the San Juan Water Conservancy District water rights from the San Juan River sufficient to fill and refill a 35,000 acre-foot reservoir. Present water demand within the PAWSD service district (including a 34% loss rate) is 2000 acre feet per year.

The Supreme Court returned the case to Lyman last November. The Court issued a unanimous decision which demanded the lower court provide findings of fact addressing four critical questions:

- What is a reasonable planning period?
- What is the substantiated population projections for the districts?
- What is the reasonably anticipated water use of that population?
- Can and will the water rights granted be effectively put to use?

Supporters of Lyman’s original decision characterized the Supreme Court opinion as a request for the findings of fact to support a supportable decision. Opponents of the water rights grant characterized the lengthy and detailed dissection of the Lyman’s decision as a demand by the higher court for a broad reconsideration of every critical aspect of the case.

Lyman has modified the most outstanding aspect of his original opinion — the 95-year planning period for water rights at the Dry Gulch diversion point — by restricting the districts to a 50-year planning period.

The Supreme Court left little doubt in its unanimous opinion that a planning period longer than 50 years for Dry Gulch would receive heightened scrutiny. The districts would need to present population growth, engineering, regulatory and legal challenges (scores of lawsuits remaining after 10 years of litigation) exceeding those confronted by the City of Thornton when it was allowed a 50-year planning period in the *Bijou* case. Justice Nathan Coats characterized the difficulties faced in the Dry Gulch project as “almost trivial” by comparison.

And the districts’ lawyer, Evan Elan, modified the other request which received clear disapproval from Supreme Court last fall — the right to refill the reservoir twice annually and reuse water to extinction — when he submitted the districts’ remand brief to Lyman earlier this year which reduced water rights requested from 64,000 to 29,000 acre feet.

Lyman's decision, in this round, rewards the strategy chosen by Ela. Ela effectively stole a march on the lawyers for Trout Unlimited when briefs were submitted to Judge Lyman earlier this year. Ela submitted a brief which reduced the total annual storage claimed from 64,000 to 29,000 acre-feet, dropped the right to reuse water to extinction and agreed to "reality checks" which are designed, in theory, to subject water rights to reexamination at regular intervals.

This strategy left Trout Unlimited, in large part, making a very effective and detailed case against a case that the water districts were no longer making.

Trout Unlimited was given no opportunity to present additional evidence to Lyman beyond the initial brief. Repeatedly in their brief, Trout Unlimited asserts "additional evidence would be needed on this issue," particularly with respect to population growth, available water rights and the impacts of land use planning and water conservation on future water demand. No additional testimony was taken.

Ela asserted in his brief that "this Court heard adequate evidence to make the findings identified by the Supreme Court."

And Judge Lyman apparently agreed with this assertion about the basis for his original opinion.

Other than one concession necessitated by the 50-year planning period — a reduction in annual storage to 25,300 acre feet from the 29,000 requested by the districts in the remand brief — Lyman's opinion is a remarkably confident restatement of the reasoning behind his original 2006 verdict. This decision is no genuflection to the Supreme Court. At one point, Lyman asserts the *Bijou* doctrine is "sufficient" to the present case.

On the question of population growth and water demand, Lyman's findings of fact are based upon Steve Harris's population projections in his 2003 Appraisal Report. Harris's projections are 30% higher than those of the Colorado State Demography Office. They presume a population growth rate of 7% for this decade and a County-wide population at the end of next year of nearly 20,000. Current population is estimated at 12,000.

Regarding present and future water demand, Lyman's findings of fact accept Harris's contention that water demand is presently 215 gallons per day per person and that conservation efforts will only reduce water usage to 200 gallons per day per person over the next 50 years. In fact, Harris assumes this 200 gallons figure will be valid beyond the year 2055. Interestingly, these findings are contradicted by PAWSD's own Water Conservation Plan, which finds that district water users have already reduced their usage to 175 gallons per day per person, a figure which includes a 34% loss of treated water within the district's aging network of pipes.

And this 175 gallon figure does not include the 10% reduction the district forecasts the Water Conservation Plan will achieve over the next ten years. Or the more "meaningful" conservation savings the Plan forecasts when full implementation takes place after the initial ten-year period.

The total appropriation amount of 25,300 acre feet relative to the year 2055 is also a clear victory for the water districts. Combined with the more than 5,000 acre feet PAWSD already possesses (including Village Lake and the half of Hatcher not counted for no accountable reason), the districts will possess potential water storage of over 30,000 acre feet — if this decision goes unchallenged or is confirmed by the Supreme Court. Present demand — if PAWSD could reduce water losses to an industry standard of 10% — would amount to less than 1500 acre-feet, only 5% of this 30,000 acre foot potential.

And readers should note that Lyman's decision only restricts water rights within a 50-year period. It does not restrict the size of the dam the districts may construct at Dry Gulch in anticipation of gaining further water rights from the court or from purchasing water rights from rights holders. Present in the findings of fact in Lyman's decision is the curiously persistent 160 foot high dam flooding 621 acres. These are the dimensions of a 35,000 acre-foot reservoir at Dry Gulch, but also serve as the accepted dimensions for a 29,000 acre foot reservoir, a 25,000 acre foot reservoir or, in this decision, a potential 19,000 acre foot reservoir. It is hard to escape the conclusion that the districts are flexible about how much water is to be stored at Dry Gulch as long as the dam holding back that water is 160 feet high and water floods over 600 acres.